Supreme Court, U.S.
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No. 95-772

In The

Supreme Court of the United States

October Term, 1995

OUTDOOR COMMUNICATIONS, INC.,

Petitioner,

vs.

CITY OF MURFREESBORO, TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN EMERY MCGANNON
Counsel of Record
THOMAS L. REED, JR.
Attorneys for Respondent
City of Murfreesboro
111 West Vine Street
P. O. Box 5055
Murfreesboro, TN 37133-5055
(615) 849-2616

7970
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the courts below misapplied Tennessee law and abused their discretion in severing unconstitutional provisions in a sign ordinance, instead of striking the entire ordinance, when the comprehensive ordinance contained a severability clause.

2. Whether, as part of a comprehensive sign ordinance, a city may require any person flying a flag to obtain a permit and pay a moderate fee if the flag is over a specified size and is intended to be permanent.

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I

STATEMENT OF THE CASE

A. Statement of Facts

The sign ordinance adopted in 1990 by Respondent, the City of Murfreesboro, Tennessee, regulated the erection and maintenance of all signs, on-site, off-site, temporary, and existing non-conforming in the city. Petitioner's Appendix, "App.", pp. 59a-123a. One stated reason for adoption of the ordinance was to restrict signs and lights from distracting drivers of motor vehicles and from obstructing their vision. Additionally, Respondent sought to reduce conflict between public and private information systems, to protect the environment and the public health, safety, comfort, morals and convenience, to promote aesthetics, and to enhance the economy, business and industry of the city. The Respondent required permits and fees for all signs, banners, billboards, flags, and similar structures, except for fifteen (15) exempted categories. The category of American, State, City and County flags was one of those exempted from the permit and fee requirement.

This exemption was held below to have created an impermissible distinction between signs based on their speech content. App., p. 4a. With the striking of this exemption, American, state, city and country flags would not be exempt from the ordinance's permit and fee requirements, unless they were exempt under another, remaining category. One such category exempts signs smaller than four and one-half square feet in area; another category exempts temporary signs, other than inflatable and portable signs. App., p. 82a. The ordinance does not make it a crime to display an American flag in excess of four and one-half square feet. There are no facts or citations of authorities in the record about an "official" size of the American flag.

The ordinance contains restrictions on off-site signs. No requirement of the ordinance explicitly prohibits the construction

of new off-site sign structures. Off-site sign restrictions are based on the proximity of the sign to an interstate highway and compliance with several distance requirements. App., p. 102a. The Petitioner submitted an affidavit asserting that the sign ordinance prohibited the construction of any new, off-site signs in the City. App., pp. 5a-6a. This assertion was disputed, the City submitted an affidavit to the contrary effect from the Chief Building Official. Respondent's Appendix. pp. 1a-3a. The creation of a new interstate within the city affording the opportunity for new off-site signs was put forth both in this affidavit, and at oral argument below, without contradiction. Respondent's App., p. 2a, App., p. 7a. The Sixth Circuit expressly rejected Petitioner's assertion and held that the ordinance did not prohibit all new off-site signs. App., p. 7a.

The ordinance explicitly states that "If any section, clause, provision or portion of this ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, provision or portion of this ordinance which is not of itself invalid or unconstitutional." App. p. 122a.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED TENNESSEE LAW AND DID NOT ABUSE ITS DISCRETION IN SEVERING UNCONSTITUTIONAL PROVISIONS IN A SIGN ORDINANCE INSTEAD OF STRIKING THE ENTIRE ORDINANCE, WHEN THE COMPREHENSIVE ORDINANCE CONTAINED A SEVERABILITY CLAUSE.

Severability of a local ordinance is a question of state law. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772

(1988); *INS v. Chadha*, 462 U.S. 919, 931-34 (1983). It is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act, if possible. *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975) citing *Carr v. State ex rel. Armour*, 196 Tenn. 256, 265 S.W.2d 556, 558 (Tenn. 1954). The presence of the severability clause within a statute evidences an intent on the part of the legislature to have the valid parts of the statute left in force if some part is declared unconstitutional. *Catlett v. State*, 336 S.W.2d 8, 10 (Tenn. 1960). It is clear that the Murfreesboro City Council's intent, based upon the presence of a severability clause, was to have the sign ordinance remain valid after the severance of any invalid or unconstitutional provisions. This Court has held that a statute is presumed divisible, where the legislature provides that the invalidity of any section shall not affect the validity of others. *Williams v. Standard Oil of Louisiana*, 278 U.S. 235 (1929); *Ellwest Stereo Theater Inc. v. Boner*, 718 F. Supp. 1553, 1581 (M.D. Tenn. 1989).

The Sixth Circuit Court of Appeals was correct in upholding the trial court's decision that the Murfreesboro sign ordinance was constitutionally valid after severing portions which created a distinction between signs based on their content. The severed portions exempted certain signs from the ordinance's requirement that a permit be obtained and a fee paid. The effect of striking the exemptions was to require that a permit be obtained and the fee paid.

Petitioner incorrectly asserts that deleting the exemptions created a ban on: flags, address signs, convenience signs, governmental signs, holiday decorations signs, address plaques, ball field signs, and signs on glass surfaces. No such finding was made by the magistrate, the trial court, or the Court of Appeals and no such finding is justified by the language in the sign ordinance. Petitioner is also mistaken in asserting that such signs

are not allowed by any other provision of the sign ordinance. That flags were not banned by the deletion of the permit and fee exemption is shown by Section 11(D) of the sign ordinance, which prohibits any flag from being tattered, torn or faded, and from being improperly attached, App., p. 103a, and by Section 9, where the specifications for permissible flags are described, App., pp. 95a, 99a. Neither of these provisions were stricken by the courts below.

After severance, the ordinance logically and coherently exempted signs that were either temporary, or small enough not to interfere with traffic, from the fee and permit requirements.

This Court need not accept the writ to resolve a conflict between the Courts of Appeal. The Sixth Circuit Court of Appeals has not directly contradicted the holding of the Third Circuit Court of Appeals in *Rappa v. New Castle County,* 18 F. 3d 1043 (3rd Cir. 1994). There are legal and factual differences between the two cases. In *Rappa,* the Third Circuit severed one section of a three section statute because that section exempted certain signs, based on content, from a general ban on signs on or near the right of way for interstate highways. After deleting the exemption as unconstitutional, the *Rappa* court decided to strike the entire section of the statute because it would restrict more speech as amended than the legislative body initially intended.

Rappa involved a total prohibition of speech; if the statute had been upheld, signs advertising local industries and meetings would have been completely banned. As the Sixth Circuit Court observed, this case involves a reasonable permit and fee requirement; there are constitutionally significant differences between a total prohibition of speech and a place and manner restriction of speech. App. p. 7a. Only if one merges them into a generic "more restrictive" standard, as urged by Petitioner, are the opinions in legal conflict.

The *Rappa* court did not have a specific indication of legislative intent in the statute in question to guide its severance analysis; its decision was based only on a general Delaware state statute on elision. Factually distinct, the Murfreesboro ordinance's intent is to regulate all outdoor advertising signs yet it contains "specific evidence" of a legislative preference for elision since it contains a severability clause. App., pp. 60a-64a, p. 122a. In addition to the severability clause, Section 17 of the ordinance supports the conclusion of the courts below that elision, rather than striking the entire ordinance, was the legislative intent. Section 17 provides that if any provision of the ordinance is found to be in conflict with any other applicable governmental law, that the regulation which establishes the more restrictive rule or higher standard should govern. App., p. 121a. By severing the exemptions from the permit and fee requirements a more restrictive or higher standard was created. The expressed preference of the adopting body was for such higher standard; the absence of any standard, as would result from striking the entire ordinance, was clearly disfavored. This provision of the Murfreesboro sign ordinance further distinguishes it from the situation in *Rappa* where there was no expressed legislative willingness to restrict speech more than the law in question provided. Because of these factual distinctions between the cases, and the possible differences between Delaware and Tennessee state laws on severability, the severance decision was within the discretion of the courts below; the Petitioner simply disagrees with the conclusion of the magistrate, the trial judge and the Court of Appeals as to Respondent's legislative intent. App. p. 56a, fn. 5, App. p. 24a, App. pp. 3a-4a.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT A CITY MAY REQUIRE ANY PERSON FLYING A FLAG TO OBTAIN A PERMIT AND PAY A MODERATE FEE AS PART OF A COMPREHENSIVE SIGN ORDINANCE IF THE FLAG IS OVER A SPECIFIED SIZE AND IS INTENDED TO BE PERMANENT.

Neither the Murfreesboro sign ordinance, nor the Court of Appeals' interpretation of it, make it a crime to fly an American flag as asserted by Petitioner.

The Murfreesboro sign ordinance allows flags to be used as temporary signs, Section 8; as on-site permanent signs, Section 9; and, as off-site permanent signs, Section 10. The sign ordinance requires persons seeking to erect a sign within the City to first obtain a sign permit and to pay the permit fee, Section 3. From this general requirement of obtaining a sign permit and paying a permit fee, the City exempted certain signs. Several exemptions from obtaining a permit and paying a fee were held to be unconstitutional and severed. After such severance, fewer signs were exempt from the permit process. Exemptions remained for signs that were temporary in nature (except for inflatable and portable signs) and for signs that were less than four and one half square feet in surface area. Flag signs that were permanent and in excess of four and one half square feet in surface area were thus not exempt from the permit and fee requirement, regardless of their content. The ordinance required that all permanent outdoor flags in excess of a specified size, whether advertising a car dealership or an American flag, meet uniform standards. This content-neutral regulation of all flag signs was a reasonable time and manner restriction.

The Petitioner is incorrect in stating that the ordinance does

not provide for the issuance of a flag permit and in implying that persons must obtain a variance, by showing a hardship, in order to display a flag larger than four and one half square feet. Petition, p. 11, fn. 3. Section 3 of the ordinance describes the permit procedure to be followed for different types of signs. App., p. 73a-75a. Flag signs are classified as "ground signs" when permanent in Section 9(c) of the ordinance at subsections (1)(d), (2)(d), and (4)(c). App., pp. 94a-99a. Therefore, the permit procedure for "ground signs" described in Section (3), would apply to permanent flags. App., p. 74a.

No variance is needed to fly a permanent flag larger than four and one half square feet. The provisions of Section 9(C)(1)(d), 9(C)(2)(d) and 9(C)(4)(c) state that flags shall have a maximum size of 32 square feet each and that eight flags (4 per entrance) are allowed on each lot.[1]

If, and only if, a landowner wanted to permanently fly a flag larger than 32 square feet in size, or to permanently fly more than eight flags per lot, would a variance under Section 15-2 of the ordinance be necessary. App., pp. 117a-121a.

For these reasons, the Petitioner's statement of the second question presented is incorrect in suggesting that the ordinance made it a crime to fly an American flag in excess of four and one half square feet. The Petitioner also mistakenly states that "the size of the official American flag is 13.35 square feet". No authority for this proposition was cited. A federal statute establishes the content of the official flag of the United States but does not establish its size. 4 U.S.C.S. § 1. Executive Order No. 10834 of August 21, 1959, 24 Fed. Reg. 6865, authorizes certain

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1. If the flag were a temporary flag, no permit would be required, the number would be limited to three per lot, and the maximum size of each flag would vary, based on the zoning of the lot, from 16 to 64 square feet. App., pp. 90a-91a.

flag sizes for the executive branch of the United States government; Part II, Sec. 21 (11), authorizes several flag sizes, including a flag with a dimension of 1.32 feet by 2.50 feet. Such a flag would be less than four and one half square feet in area (3.3 square feet).

Even if the Petitioner's statement of the question presented and its description of the official size of the flag were correct, this issue is moot. Although not made a supplemental part of the record below, the Murfreesboro City Council amended the sign ordinance in 1994 to provide that three flags per zoned lot are exempt from the permit and fee requirement. Since that legislative change, there can be no claim of an unlawful burden on the right to fly a large American flag.

CONCLUSION

City of Murfreesboro, Tennessee, prays that this Court deny Outdoor Communication, Inc.'s Petition for Writ of Certiorari, because the Court of Appeals ruling was correct. The ruling does not conflict with other decisions of this Court or of other Circuit Courts of Appeal. This Court need not resolve a dispute over the application of state principles of severance and elision. Acceptance of this case is not necessary to protect the right to fly the American flag. There are no compelling reasons under Supreme Court Rule 10.1(a) or otherwise for the writ to be granted.

Respectfully submitted,

SUSAN EMERY MCGANNON
Counsel of Record
THOMAS L. REED, JR.
Attorneys for Respondent
City of Murfreesboro
111 West Vine Street
P. O. Box 5055
Murfreesboro, TN 37133-5055
(615) 849-2616

APPENDIX — AFFIDAVIT OF BETTS M. BARBIER SWORN TO MAY 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL ACTION
FILE NO. 3 90 0231
JUDGE HIGGINS

OUTDOOR COMMUNICATIONS, INC.

Plaintiff,

CITY OF MURFREESBORO, TENNESSEE,

Defendant.

AFFIDAVIT OF BETTS M. BARBIER IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF TENNESSEE)
:SS
RUTHERFORD COUNTY)

Before me, the undersigned Notary Public, personally appeared BETTS M. BARBIER, who, after being duly sworn according to law, did depose and state on oath as follows:

1. My name is BETTS M. BARBIER. I am the Chief Building Official for the City of Murfreesboro, Tennessee. As a part of my official duties, I am responsible for the issuance of sign permits and enforcement of the provisions of the Sign Ordinance of the City of Murfreesboro, adopted on August 16, 1990.

2. Because of my responsibility to enforce the Sign

Appendix

Ordinance and building and housing codes for the City of Murfreesboro, I am aware of the municipal boundaries of the City. I am further aware that the City Council periodically considers the annexation of additional territory into the City. The annexation of the additional territory may result in an additional off-site billboard locations becoming available within the City. While Interstate 24 is the only interstate highway presently located within the boundaries of the City of Murfreesboro, I am aware of the proposed construction of Interstate 840 in the Murfreesboro area which may result in additional interstate highway frontage within the municipal boundaries.

3. While off-site billboards are used in the City of Murfreesboro, there are other available means of advertising and disseminating information. The City of Murfreesboro is served by *The Daily News Journal*, a newspaper published daily within the City and *The Rutherford Courier*, a weekly newspaper publication. Daily editions of *The Tennessean* and *The Nashville Banner*, two newspapers published in Nashville, Tennessee are also distributed daily within the City of Murfreesboro.

4. The City of Murfreesboro is served by at least five broadcast commercial television stations including WNGE, Channel 2 in Nashville, WSMV, Channel 4 in Nashville, WTVF, Channel 5 in Nashville, WZTV, Channel 17 in Nashville and, WMTS, Channel 27 in Murfreesboro. The City of Murfreesboro is also served by a cable television system operated by United Artists. I have personally observed commercial advertising and the dissemination of non-commercial information from Murfreesboro businesses and other entities in the newspapers distributed within the City of Murfreesboro and on cable and broadcast television.

5. While construction of new billboards may be desirable to the Plaintiff in this suit, such construction is not mandatory for the continuation of their business within the City. The Sign Ordinance does not require the removal of non-conforming signs, and those non-conforming signs can be legally maintained within the City for an indefinite period. Even if the owner of a sign structure desires to demolish and rebuild an existing non-conforming sign structure, that right is preserved under the 1990 Sign Ordinance, subject to the requirement that the reconstructed sign conformed to certain height and area requirements.

6. I know of no instance in which an off-site billboard was required to be demolished as a result of eminent domain proceedings initiated on the part of the City of Murfreesboro.

Further Affiant saith not.

/s/ Betts M. Barbier
BETTS M. BARBIER

Sworn to and subscribed before me, this the *28th* day of May, 1991.

/s/ Mary F. Reed
NOTARY PUBLIC

My Commission Expires: *1-12-92*

Appendix

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing AFFIDAVIT OF BETTS M. BARBIER IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was mailed to Mr. Granville S. R. Bouldin, BOULDIN & BOULDIN, 122 North Church Street, Murfreesboro, Tennessee, 37130 and Mr. David H. Clint and Susan H. Sarch, SCHREEDER, WHEELER AND CLINT, 1600 Candler Building, 127 Peachtree Street, N.E. Atlanta, Georgia 30303-1845, on this the *28th* day of May, 1991.

/s/ J. Lynn Watson
J. Lynn Watson
Assistant City Attorney